COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Rulemaking to Modify)

220 C.M.R. §§ 8.00 *et seq*.) D.T.E. 99-38

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JOINT COMMENTS OF U.S. GENERATING

COMPANY AND USGEN NEW ENGLAND, INC.

ON PROPOSED REVISIONS TO 220 C.M.R. §§ 8.00 ET SEQ.

These comments are submitted in response to the Notice of Proposed Rulemaking (D.T.E. 99-38) of the Department of Telecommunications and Energy (the "Department") dated April 27, 1999. U.S. Generating Company and USGen New England, Inc. (the "Affiliates") appreciate having this opportunity to comment on the Department's Proposed Revisions to 220 C.M.R. §§ 8.00 *et seq*. which govern sales of electricity

products by small power producers and cogenerators to utilities and vice versa ("QF regulations"). The Affiliates are pleased that the Department has initiated this rulemaking to address what has been an important "loose end" in the Commonwealth's ongoing electric industry restructuring process. Establishing correct pricing for all new market entrants, including QFs and "on-site generating facilities," is an important refinement to Massachusetts' competitive generation market.

Before commenting on the Department's Proposed Revisions, the Affiliates wish to state two assumptions they have made regarding the Department's goals for these rules. First, the Affiliates assume that there is no intent to alter existing QF contracts in any manner by these Proposed Revisions. Second, they assume that these revisions are not intended to supplant or conflict with any transmission pricing or market rules or policies administered by the Independent System Operator ("ISO") and approved by Federal Energy Regulatory Commission. Consistent with those assumptions, the Affiliates offer for the Department's consideration the following comments on and clarifying amendments to its Proposed Revisions:

1. Section 8.03(1)(a): Grandfathering Provision

Located within the "General Terms and Conditions" section, this provision appears to be designed to clarify that the new rules will not apply to existing QF contracts:

Nothing in these regulations shall be construed to affect, modify, or amend terms and conditions of an existing Qualifying Facility's contract with respect to the sale of its energy or capacity.

Proposed Revisions 220 C.M.R. 8.03(1)(a). However, the Affiliates see two potential shortcomings with this language. First, the modifying phrase "with respect to the sale of its energy or capacity" may be construed as limiting the areas of existing contracts which are not to be affected, modified, or amended. As the Department is well aware, QF contracts contain many other provisions in addition to the terms governing the sale of energy and capacity such as interconnection requirements. The Affiliates believe that *no aspect* of an existing QF contract can be modified by these regulations as a matter of law. Therefore, we recommend, at a minimum, (i) the deletion of the potentially limiting phase "with respect to the sale of its energy or capacity," (ii) substitution of the word "an" with "any" and (iii) amending the word "contract" to read "contracts". With those modifications, the provision would read:

Nothing in these regulations shall be construed to affect, modify or amend terms and conditions of any existing Qualifying Facility's contracts.

Second, the provision as drafted does not define what constitutes an "existing" QF contract. Once promulgated, this language could be construed to exempt from the

operation of these regulations any QF contract that *ever* came into existence, including those entered into *after* these revisions were adopted because such contracts would then be "existing." To remedy that unintended result, the regulations should define "existing" to mean those approved by the Department prior to the effective date of this revision. However, as an alternative to solve both of the concerns expressed here, the Affiliates recommend that the Department substitute its proposed language with the following:

The regulations under 220 C.M.R. §§ 8.00 *et seq*. which were in effect on the date of approval by the Department of a Qualifying Facility's power sale agreement shall govern that agreement unless otherwise agreed to by the parties and approved by the Department.

The Affiliates believe that this language would accomplish the Department's intent to grandfather existing agreements without any ambiguities as to scope of the exemption or vintage of the agreements grandfathered.

2. 8.05(7): Short-Run Capacity or Reserves Payments

The Affiliates seek clarification of two aspects of this provision. First, which of the market products produced by a QF or on-site generating facility is the Distribution Company *obligated* to buy? Second, if a QF or on-site generating facility sells energy to a Distribution Company under this revised regulation, is the QF or on-site generating facility *obligated* to sell *all* of the products associated with that energy or may it sell some of the products into the market separately? The Affiliates believe that some further guidance on these issues should be included to eliminate any ambiguities.

3. 8.03(2)(b): Reciprocal Duties Regarding Information, Rules, and Requirements

The Affiliates do not object to any of the stated requirements. However, these rules should impose on the Distribution Companies a reciprocal duty to make known to the QF the type of information which the Distribution Company expects to receive and what the Distribution Company considers "timely" receipt. By having the obligations of both sides spelled out, the odds of the products produced by the QF going unsold due to an information glitch will be reduced.

4. 8.01(1): Authority to Promulgate

The Affiliates note that the Department has not cited any authority under which to promulgate these rules other than the Public Utilities Regulatory Policies Act of 1978

("PURPA"). In order to include sales from on-site generation facilities, a citation to other statutory authority appears necessary given that not all on-site generating facilities would be qualifying facilities under PURPA.

Respectfully submitted,

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